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No. 03-724

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Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

STEPHEN M. SHAPIRO
TYRONE C. FAHNER
ANDREW S. MAROVITZ
JEFFREY W. SARLES
MAYER, BROWN, ROWE & MAW LLP
190 South La Salle Street
Chicago, IL 60603
(312) 782-0600

Attorneys for Petitioner BASF Corporation

ARTHUR F. GOLDEN
Counsel of Record
LAWRENCE PORTNOY
CHARLES S. DUGGAN
SHANNON A. ROGERS
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

Attorneys for Petitioner F. Hoffmann-La Roche Ltd

[Names and addresses of additional counsel listed on signature pages]

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RULE 29.6 STATEMENT

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REPLY TO BRIEF IN OPPOSITION

Several circuit courts have expressly recognized the direct conflict among the courts of appeals over the question presented in this case. Pet. 8-9. Respondents offer no valid reason why this case is not an appropriate vehicle, and why this Court should not act now, to resolve that conflict. Nor have respondents answered petitioners' showing that, prior to the enactment of the FTAIA, the Sherman Act was not applied to remedy the effects of anticompetitive conduct on foreign commerce, and that the FTAIA—a 1982 amendment to the Sherman Act—was passed to *limit*, not expand, the Sherman Act's extraterritorial reach. The text of the FTAIA, as the Solicitor General explained below, "contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce." Pet. App. 75a.

I. THIS IS AN APPROPRIATE CASE TO RESOLVE THE QUESTION PRESENTED.

1. This case squarely presents the question whether injuries that arise from the effects of anticompetitive conduct on purely foreign commercial transactions are actionable under the U.S. antitrust laws.

Respondents' claim that their alleged injuries arose in U.S. commerce (Opp. 2-6), and thus would be actionable even if this Court were to reverse the D.C. Circuit, is untenable. Respondents do not dispute that they are foreign companies that purchased vitamins in foreign countries from other foreign companies for delivery outside the United States. Their quotations from the complaint, prior arguments and the opinion below (*id.*) offer no basis for placing their vitamin purchases within U.S. commerce. The petition accurately states that respondents have never contended that they were injured *in* U.S. commerce. Pet. 5.

Respondents' citation of the allegation in their complaint that petitioners' conduct "caused injury to the Plaintiff Classes both *inside the United States* and in foreign nations" (Opp. 3) is highly misleading. This lawsuit *formerly* included two purported plaintiff classes of purchasers of vitamins for delivery outside the United States: a class of foreign entities and a class of U.S.-based entities. Pet. App. 6a. Similarly, the purported representative plaintiffs formerly included two U.S.-based entities, one of which (alone among the plaintiffs) alleged that it had "suffered injury in the United States." *Id.* at 53a. The two U.S.-based plaintiffs both *withdrew* from this lawsuit before entry of final judgment by the district court, leaving only respondents, who are "foreign purchasers, who bought vitamins exclusively outside the United States" (*id.* at 8a). The complaint contains no allegation that *respondents* were injured "inside" the United States.

Respondents' contention that the vitamin cartel fixed prices on a "worldwide" basis using U.S. prices as the "benchmark" (Opp. 3-5) does not change the fact that their alleged injuries directly resulted from the cartel's effects on the purely *foreign* commercial transactions in which they engaged—*i.e.*, the alleged fixing of vitamin prices in foreign markets. Respondents' injuries "arise from" those foreign effects, not other effects on the United States. If respondents' sweeping theory of antitrust jurisdiction were correct, federal district courts would become world courts in cases of this kind, required to determine whether purchasers in foreign nations paid anticompetitive overcharges to foreign sellers. There is no basis for concluding that Congress ever intended that result under the Sherman Act or the FTAIA.

The Fifth Circuit in *HeereMac* squarely rejected respondents' argument. There, too, the plaintiff had alleged a "worldwide" conspiracy to control a "single, unified, global market" for heavy barge services. *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420, 425 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*,

534 U.S. 1127 (2002). The Fifth Circuit nevertheless refuted the assertion that the plaintiff's injuries from paying fixed prices for barge services in the North Sea "arose from" the effect of the conspiracy on the United States: "[W]hile we recognize that there may be a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea [by the plaintiff], the FTAIA requires more than a 'close relationship' between the domestic injury and the plaintiff's claim; it demands that the domestic effect 'gives rise' to the claim." *Id.* at 427. See also *id.* n.24.

2. The case is in a procedural posture appropriate for review, contrary to respondents' contention (Opp. 6-9). The court of appeals reviewed a dispositive ruling against respondents after entry of final judgment. Pet. App. 8a. If this Court reverses, that final judgment will be reinstated. This Court commonly reviews cases in precisely this procedural posture, including at least one other antitrust case to be decided this term. *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682, *petition for cert. granted*, 71 U.S.L.W. (U.S. Mar. 10, 2003) (granting review of decision reversing order of dismissal). Several leading antitrust decisions, relied on by both sides in these proceedings, resulted from review of cases in the same procedural posture as this one. See, *e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (review of appellate decision reinstating claims dismissed by the district court); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (review of decision reversing summary judgment).

This case need not await further proceedings on the merits below. The pure question of law at issue—whether this case can proceed at all—is a discrete threshold question that is ready now for review by this Court. Respondents' goal, of course, is to avoid any review of the court of appeals' decision in the hope that petitioners will settle their claims rather than risk massive treble damages liability for foreign

claims worldwide. See generally *In re Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, C.J.) (noting pressures on defendants to settle claims threatening massive potential damages). Indeed, in *Kruman*, the petitioners settled while their petition for review was pending before this Court. *Christie's Int'l PLC, et al., v. Kruman, et al.*, 71 U.S.L.W. 3169 (Aug. 8, 2003) (No. 02-340). The FTAIA is a *jurisdictional* limitation, and its purposes would be defeated by allowing massive cases such as this one to lumber forward toward trial.

II. THE CLEAR CONFLICT AMONG THE COURTS OF APPEALS IS RIPE FOR REVIEW.

Respondents' attempts to minimize the conflict among the courts of appeals and the significance of the question presented—which the Solicitor General described as one of "exceptional and recurring importance"—are unavailing.

1. There is a clear division in the courts of appeals over the extraterritorial scope of the Sherman Act. Respondents stand alone in asserting that the decisions of the D.C. Circuit in this case and the Second Circuit in *Kruman* do not conflict with the decision of the Fifth Circuit in *HeereMac*. Opp. 9-10. The D.C. Circuit, other courts of appeals and the Solicitor General have all recognized the direct conflict created by these decisions. Pet. 8-11. Respondents' position that they are "consistent" has no merit; it rests on their invalid argument, refuted above (*supra*, p. 2-3), that their injuries (and also the injuries of the plaintiffs in *Kruman*) "arise from" a U.S. effect of the alleged conspiracy (Opp. 10). As noted above, the Fifth Circuit rejected precisely the same argument in *HeereMac*. See, *supra*, p. 3.

Respondents' speculation that the Fifth Circuit may reverse itself to conform to the views of the D.C. and Second Circuits (Opp. 11) is unfounded. The Fifth Circuit is unlikely to revisit its construction of the FTAIA, which has been endorsed by the United States and the Federal Trade Commission. Pet. 12

n.3. It is also entirely consistent with prior case law. Respondents' argument that the Fifth Circuit's decision is contrary to precedent does not identify any prior decision of any court holding that injuries arising from the effects of anticompetitive conduct on purely foreign commercial transactions are actionable under the federal antitrust laws. See Opp. 12. Indeed, respondents conceded in argument before the district court that no court had ever interpreted the federal antitrust laws to reach wholly foreign transactions such as those alleged in this case. Pet. App. 52a.

There is no merit to respondents' suggestion that this Court should delay resolving the conflict over the FTAIA to allow the lower courts to "explore" other unidentified issues "related to jurisdiction." Opp. 12-13. The FTAIA imposes a *legislative* limitation on the extraterritorial application of U.S. antitrust law, and courts have appropriately turned to that statute in resolving disputed questions on that subject. That effort has now led to an inter-circuit conflict that only this Court can resolve.

2. Respondents contend that this Court should await another case to resolve the conflict among the courts of appeals, citing two cases pending in the lower courts. Opp. 14. There is no basis for assuming that either of these cases will be presented to this Court. Nor have respondents offered any reason to believe that either would be a better vehicle to review the question that is squarely presented in this case or would add anything new to the analyses of the statute already conducted by the Second, Fifth and D.C. Circuits.

Respondents' denial that foreign plaintiffs will flood the U.S. courts with claims that properly belong in foreign courts (Opp. 15) ignores the fact that thousands of foreign litigants could assert claims identical to respondents' in this action alone. See Lily Henning, *Antitrust Goes Global*, LEGAL TIMES, Oct. 13, 2003, at 1, 22 (reporting that one U.S. lawyer has "been contacted by hosts of foreign plaintiffs, but has

advised them to wait until the appeals in *Empagran* have run their course before filing suit"). Respondents' argument that the question presented here rarely arises (Opp. 15) conflicts with the Solicitor General's statement that the issue here has "recurring importance" due to the "increasing frequency" with which "foreign plaintiffs have sued to recover damages arising out of foreign purchases of conspiratorially price-fixed items" (Pet. App. 73a). The Solicitor General has noted, moreover, the potential of the decision below to bring about "a sea change in the number and types of private actions permitted under the Sherman Act." *Id.* at 79a. A Deputy Assistant Attorney General in the Antitrust Division recently warned that it will encourage "international antitrust tourism" that would be "irresistible to many foreign plaintiffs whose alleged injuries have little to do with cognizable U.S. interests." Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement*, Speech Before the ABA Section of Antitrust Law (Nov. 18, 2003) ("*Perspectives*"), at 17 (available at http://www.usdoj.gov/atr/public/speeches/201509.htm.).

It is no response to say that Congress, rather than this Court, should resolve the conflict among the courts of appeals. Opp. 17. No bill is pending that would address this issue. Moreover, the construction of federal statutes is unquestionably the province of the courts, and the resolution of conflicts among the circuit courts is unquestionably the province of this Court. Respondents cite no authority for the proposition that this Court should not resolve disputes over the interpretation of federal legislation unless Congress has failed to act "for an intolerable period of time." Opp. 17.

3. The Third Circuit's decision in *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293 (3d Cir. 2002), provides further reason to review this case. That court determined that plaintiffs lacked standing because their injuries "occurred exclusively in foreign markets." *Id.* at 307. Respondents argue that this statement "merely reflects one of

the facts of the case." Opp. 18. But it was *the* fact that led the court to conclude that the plaintiffs' injuries were "not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act." 303 F.3d at 307. The same fact is present here. The Third Circuit's decision is thus inconsistent with the D.C. Circuit's holding that respondents have standing to assert their federal antitrust claims.

III. THE COURT OF APPEALS ERRED FOR THE REASONS STATED BY THE SOLICITOR GENERAL BELOW.

The Solicitor General has explained that "the FTAIA bars a private suit when the plaintiff's claim does not arise from the domestic effects of the challenged anticompetitive conduct." Pet. App. 74a. The contrary interpretation of the statute by the court of appeals is profoundly wrong.

1. As the Solicitor General has observed, "the most natural reading of [the FTAIA] is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court." Pet. App. 74a. The statement in the petition (at 21) that "a claim must 'arise from' a U.S. effect" is hardly an "invention" (Opp. 19). It accurately describes the statute's requirements that there be a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and that "such effect gives rise to a claim." 15 U.S.C. § 6a.

Respondents argue that, under the Solicitor General's interpretation, the same "unitary" conduct would be subject to U.S. antitrust regulation in certain cases but not in others, depending on where a given plaintiff's injury arose. Opp. 20. That result is entirely consistent with the statutory text. "The FTAIA's focus," as the Solicitor General explained below, "is on domestic effects of anticompetitive conduct" (Pet. App. 75a). The statute makes clear that the federal antitrust laws remedy only those injuries that arise from the effects of anticompetitive conduct on U.S. commerce. Respondents'

additional argument that this interpretation renders the FTAIA's proviso redundant (Opp. 21) was rejected even by the D.C. Circuit (Pet. App. 18a).[1]

2. The legislative history relied upon by the D.C. Circuit and respondents (Opp. 21-23) fails to justify their interpretation of the FTAIA. The Solicitor General has explained that "nothing in the Act's legislative history speaks to the issue of foreign purchasers whose injuries do not arise from a conspiracy's effects on domestic commerce" and that "there is no indication that Congress had in mind the scenario occurring here—foreign plaintiffs suing to recover for alleged overcharges paid in foreign transactions for foreign goods." Pet. App. 76a. Tellingly, respondents do not even address the statement in the legislative history that "the effect providing the jurisdictional nexus"—*i.e.*, the U.S. effect—"must also be the basis for the injury alleged under the antitrust laws." H.R. Rep. No. 97-686, at 10-12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487.

3. Respondents do not seriously defend the D.C. Circuit's policy judgment that "suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies." (Pet. App. 32a). As previously demonstrated, this judgment is inconsistent with the antitrust laws' historically limited focus on the U.S. effects of anticompetitive conduct (see Pet. 4, 15-16; Pet. App. 77a). The D.C. Circuit's policy judgment also clashes with the longstanding principle that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v.*

[1] As a Deputy Assistant Attorney General recently stated, "the [*Heere-Mac*] court accurately captured the meaning of the FTAIA as a matter of sound statutory construction, [and] the *Kruman* and *Empagran* courts did not." Delrahim, *Perspectives*, at 6-7.

Zenith Radio Corp., 475 U.S. 574, 582 (1986).[2] Moreover, as the Solicitor General has explained, the panel's decision threatens to undermine deterrence by discouraging participation in amnesty programs that are essential to enforcement of the federal antitrust laws. Pet. App. 79a (warning that the decision below "has the potential to weaken deterrence—the opposite of what the panel intended").

4. As the Solicitor General explained below, the D.C. Circuit's interpretation of the FTAIA is inconsistent with "principles of antitrust injury and standing embedded in the FTAIA," which "inform a proper interpretation of the FTAIA's language and require that the plaintiff—and not just someone—have a 'claim' under the Sherman Act." Pet. App. 74a, 75a-76a. Respondents' only answer is the question-begging assertion that "this is not a case about 'foreign conduct' as that term is used in the antitrust laws." Opp. 29. As explained in the petition (Pet. 21), only injuries that "flow from" the effect on *U.S. commerce* that makes a defendant's acts unlawful are actionable under governing rules of standing, and the FTAIA in no way altered those fundamental requirements.[3]

[2] Respondents garble the Areeda treatise (Opp. 28) by failing to include the final sentence of the paragraph they quote: "Thus, although the exporter can sue with respect to the injured export business, *a foreign consumer whose only injury is felt entirely in his foreign country cannot.*" 1A Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW (2d ed. 2000) ¶ 272h2, at 360 (emphasis added).

[3] Respondents wrongly claim that this argument was not made below. See Petrs' C.A. Br. at 40 (arguing that "liability * * * is limited to those injuries that flow from the feature of the restraint that makes it a violation, which is its quality of having caused [] an anticompetitive effect on U.S. commerce"). Moreover, the court below squarely decided the question of respondents' standing. Pet. App. 33a-37a.

CONCLUSION

The petition for a writ of certiorari should be granted.[4]

Respectfully submitted,

STEPHEN M. SHAPIRO
TYRONE C. FAHNER
ANDREW S. MAROVITZ
JEFFREY W. SARLES
MAYER, BROWN, ROWE & MAW LLP
190 South La Salle Street
Chicago, IL 60603
(312) 782-0600

Attorneys for Petitioner BASF Corporation

ARTHUR F. GOLDEN
Counsel of Record
LAWRENCE PORTNOY
CHARLES S. DUGGAN
SHANNON A. ROGERS
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

Attorneys for Petitioner F. Hoffmann-La Roche Ltd

PATRICK F. MCCARTAN
JOHN M. MAJORAS
DANIEL H. BROMBERG
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Attorneys for Petitioner Aventis S.A. (f/k/a Rhône-Poulenc S.A.), Aventis Animal Nutrition Inc. (f/k/a Rhône-Poulenc Animal Nutrition Inc.), Aventis CropScience USA Inc. (f/k/a Rhône-Poulenc Inc.) and Hoechst Marion Roussel SA

ROBERT PITOFSKY
BRUCE L. MONTGOMERY
FRANKLIN R. LISS
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Attorneys for Petitioner Hoffmann-La Roche Inc. and Roche Vitamins Inc.

KENNETH PRINCE
STEPHEN FISHBEIN
RICHARD SCHWED
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

Attorneys for Petitioner BASF AG

D. STUART MEIKLEJOHN
STACEY R. FRIEDMAN
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

Attorneys for Petitioner Eisai Co., Ltd., Eisai U.S.A., Inc. and Eisai Inc.

[4] Respondents filed their opposition to certiorari one day after the filing of the petition in a transparent effort to prevent governmental and private amici from explaining the exceptional public importance of this case. Although the Solicitor General has already stated that the issue here is one of exceptional importance and that the decision by the D.C. Circuit is incorrect, the Court may nevertheless wish to seek the views of the United States as to whether the petition should be granted.

LAWRENCE BYRNE
GEORGE VUOSO
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200

Attorneys for Petitioner Takeda Chemical Industries, Ltd. and Takeda Vitamin & Food USA, Inc.

MICHAEL L. DENGER
MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

Attorneys for Petitioner Daiichi Pharmaceutical Co., Ltd., Daiichi Pharmaceutical Corporation and Daiichi Fine Chemicals, Inc.

LAURENCE T. SORKIN
ROY L. REGOZIN
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000

Attorneys for Petitioner Akzo Nobel Chemicals B.V. and Akzo Nobel Inc.

PAUL P. EYRE
ERNEST E. VARGO
BAKER & HOSTETLER LLP
1900 East 9th Street
3200 National City Center
Cleveland, OH 44114
(216) 621-0200

Attorneys for Petitioner Bioproducts Incorporated

DONALD I. BAKER
W. TODD MILLER
BAKER & MILLER PLLC
915 Fifteenth Street, N.W.
Washington, DC 20005
(202) 637-9499

ALICE G. GLASS
SPECIAL COUNSEL
BAKER & MILLER PLLC
River Landing Farm
261 River Road
Lyme, NH 03768
(603) 795-4609

Attorneys for Petitioners Chinook Group Ltd. and Cope Investments Ltd.

JAMES R. WEISS
PRESTON, GATES & ELLIS LLP
1735 New York Avenue, N.W.
Washington, DC 20006
(202) 628-1700

Attorneys for Petitioners DuCoa, L.P. and DCV, Inc.

DONALD C. KLAWITER
PETER E. HALLE
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000

Attorneys for Petitioners Degussa AG and Degussa Corporation

JAMES B. WEIDNER
KLAUS H. JANDER
FRED W. REINKE
CLIFFORD CHANCE US LLP
200 Park Avenue
New York, NY 10166
(212) 878-8000

Attorneys for Petitioners EM Industries, Inc., Merck KGaA and E. Merck

JIM J. SHOEMAKE
KURT S. ODENWALD
MARY ANN OHMS
GUILFOIL, PETZALL &
SHOEMAKE, LLC
100 South Fourth Street
St. Louis, MO 63102
(314) 241-6890

Attorneys for Petitioners
DuCoa, L.P. and DCV, Inc.

THOMAS M. MUELLER
MICHAEL O. WARE
MAYER, BROWN, ROWE &
MAW LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Attorneys for Petitioners
Lonza Inc., Lonza AG and
Alusuisse-Lonza Group Ltd
(n/k/a Alcan (Switzerland)
Ltd)

AILEEN MEYER
PILLSBURY WINTHROP LLP
1133 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 775-9800

SUTTON KEANY
BRYAN DUNLAP
PILLSBURY WINTHROP LLP
One Battery Park Plaza
New York, NY 10004
(212) 858-1000

Attorneys for Petitioner
Mitsui & Co., Ltd.

MOSES SILVERMAN
AIDAN SYNNOTT
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

Attorneys for Petitioners
Sumitomo Chemical Co., Ltd.
and Sumitomo Chemical
America, Inc.

MARTIN FREDERIC EVANS
GARY W. KUBEK
DEBEVOISE & PLIMPTON
919 Third Avenue
New York, NY 10022
(212) 909-6000

Attorneys for Petitioner
Nepera, Inc.

KENNETH W. STARR
KAREN N. WALKER
KANNON K. SHANMUGAM
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

Attorneys for Petitioners
Reilly Chemicals, S.A. and
Reilly Industries, Inc.

MARK RIERA
SHEPPARD, MULLIN, RICHTER
& HAMPTON LLP
Forty-Eighth Floor,
333 South Hope Street
Los Angeles, CA 90071
(213) 620-1780

Attorneys for Petitioner
Tanabe U.S.A., Inc.

KEVIN R. SULLIVAN
GRACE M. RODRIGUEZ
KING & SPALDING LLP
1730 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 737-0500

GRIFFIN B. BELL
JEFFREY S. CASHDAN
KING & SPALDING LLP
191 Peachtree Street, N.E.
Atlanta, GA 30303
(404) 572-4600

Attorneys for Petitioner
UCB Chemicals Corporation